

Market Services Association its Members and Associate Members and Local 703, International Brotherhood of Teamsters, AFL-CIO¹ and Local 703, a Division of Truck Drivers, Chauffeurs, Warehousemen and Helpers Union Local 707, affiliated with the National Production Workers Union, Party in Interest. Case 13-CA-29770

September 22, 1994

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On February 5, 1992, Administrative Law Judge Walter H. Maloney issued a decision finding that certain named employer-respondents had violated Section 8(a)(1), (2), (3), and (5) of the Act. The judge, however, excluded the employer-members of Market Services Association from his decision based on his approval, between the close of the hearing and issuance of his decision, of an informal settlement agreement entered into by the Association on behalf of its members. On September 23, 1992, the Board issued a Decision and Order in this matter,² adopting the judge's findings and conclusions of law and adopting his recommended Order.

Thereafter, on October 21, 1993, the General Counsel filed a motion to set aside the settlement agreement, claiming that a large number of the individual employers belonging to the Association were not in compliance with its terms. Pursuant to the General Counsel's motion, the judge issued an Order to Show Cause on November 15, 1993, directed at the members of the Association who were not in compliance with the settlement agreement but who had been initially charged and served when the case began, asking them to state why the General Counsel's motion should not be granted as to them. Thereafter, on December 10, 1993, the judge issued a Second Order to Show Cause directed at those who had not responded to the first show cause order, again directing them to show cause why the General Counsel's motion should not be granted as to them.

Subsequently, a hearing was held before the judge on February 28, 1994, on the General Counsel's motion to set aside the settlement agreement. At the hearing, the General Counsel moved to dismiss its motion as to 72 named employers, 57 of whom had complied with the settlement agreement initially, and 14 of whom had complied at a later date. Dismissal was also sought as to the Association itself, which had eventu-

ally complied. The General Counsel further moved to dismiss its motion as to 22 individual employers, who had filed responses to the show cause orders and appeared at the hearing, because they had each presented valid reasons why the original order in this case should not be applied to them. At the hearing, as requested by the General Counsel, the judge dismissed the motion to set aside the settlement agreement as to the 72 complying employers including the Association and the 22 employers to whom the order did not apply.

Thereafter, on March 28, 1994, the judge issued his Supplemental Decision and Order, granting the General Counsel's motion to set aside the settlement agreement only as to the remaining 58 individual employers who failed to respond to either Order to Show Cause.³ As to those 58 individual employers, the judge applied the findings of fact and conclusions of law issued by him in JD-28-92, and adopted by the Board in 308 NLRB 995, as fully as if they were recited again in *haec verba*.

Carnicerias Jimenez, Inc. and J & S Produce Co., 2 of the 58 individual employers listed in Exhibit A, filed timely exceptions to the judge's Supplemental Decision and Order. They each assert, *inter alia*, that they received the show cause orders but made no response because they were neither members of Market Services Association at the time of the unfair labor practices nor had authorized it to act on their behalf. They therefore urge the Board to reopen the record to enable them to adduce evidence of their non-membership. The General Counsel's answering brief argues that the exceptions are lacking in merit because both Jimenez and J & S failed to timely respond to either show cause order.

The Board⁴ has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt his recommended Order as modified.⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, except as to Carnicerias Jimenez, Inc. and J & S Produce Co., and orders that the remaining 56 named employers in Exhibit A, their officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

³The names of these 58 employers are listed in Exh. A appended to the judge's Supplemental Decision; the names of the 72 employers who were in compliance and the 22 employers dismissed at the hearing, are listed in Exh. B and C, respectively.

⁴The Board has delegated its authority in this proceeding to a three-member panel.

⁵In the absence of exceptions, we shall adopt the judge's Order against 56 of the employers listed in his Exh. A, excluding Carnicerias Jimenez, Inc. and J & S Produce Co.

¹The caption reflects the new official name of the International Union.

²*Dominick's Finer Foods*, 308 NLRB 935, enfd. docket Nos. 93-1365 and 93-1545 (7th Cir. 1994).

IT IS FURTHER ORDERED that the issue raised as to whether Carnicerias Jimenez, Inc. and J & S Produce Co. were members of Market Services Association at the time of the commission of the unfair labor practices found in this proceeding be severed and that this proceeding as it relates to these two employers be remanded to an administrative law judge to be designated by the chief administrative law judge for resolution of the above issue and for the preparation and service on the parties of a supplemental decision containing findings of fact, conclusions of law, and a recommended Order in light of the Board's remand. Following service of such supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

SUPPLEMENTAL DECISION AND ORDER

WALTER H. MALONEY, Administrative Law Judge. On February 5, 1992, after an extended hearing on the merits, I issued a decision in a consolidated case denominated *Dominick's Finer Foods*, JD-28-92, in which I made detailed findings of fact and conclusions of law and issued a recommended Order to the Board. That decision, including the findings of fact and conclusions of law there, was affirmed by the Board on September 23, 1992, at 308 NLRB 935, and the recommended Order was adopted as to four of the five original Respondents in the case.

While the case was pending before me, Respondent Market Services Association and its members and associate members entered into an informal settlement with the General Counsel. That settlement was approved by me and, on appeal, by the Board. On October 21, 1993, the counsel for the General Counsel filed a motion to set aside settlement agreement, claiming that a large number of the individual employer-members of the Association were not in compliance with its terms. She later acknowledged that some 57 named members had in fact complied. These are among the individual firms listed in Exhibit B appended to this Supplemental Decision and Order. I denied the motion to set aside the settlement agreement as to those employers. The remaining 14 employers listed in Exhibit B complied at a later date, as did the Association itself.

On or about November 15, 1993, I issued an Order to Show Cause, directed at the remaining members of Market Services Association who had been initially charged and served when the case began, asking them to state why the General Counsel's motion should not be granted as to them. On December 10, 1993, I issued a Second Order to Show Cause directed to those who had not responded to the first order, again directing them to show cause why the General Counsel's motion should not be granted. Some 22 employers whose names are listed in Exhibit C appended to this supplemental decision filed responses showing cause why the settlement should not be set aside and the terms of the original order applied to them. A hearing was held on February 28, 1994, in Chicago, Illinois, at which time these employers appeared personally or through counsel. At that time, the General Counsel was satisfied that they had presented valid reasons the original Order in this case should not be applied to

them and moved to dismiss the motion to set aside settlement as to them. The motion was granted by me.¹

The 58 individual employers whose names appear on Exhibit A, appended hereto, made no response to either Order to Show Cause which was served on them. Since they have failed to do so, I am applying to them individually the findings of fact and conclusions of law which were issued by me in JD-28-92 as fully as if they were recited again here in haec verba.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent members and associated members of Market Service Association (the Respondents) who are listed in the attached Exhibit A attached³ and their officers, directors, attorneys, supervisors, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and to bargain collectively in good faith with Local 703 International Brotherhood of Teamsters AFL-CIO (Local 703 or Local 703 IBT) as the exclusive collective-bargaining representative of all of the employees employed in the bargaining unit for which Local 703 was recognized for collective-bargaining purposes on September 1, 1990.

(b) Refusing to give full force and effect to any collective-bargaining agreements they had respectively with Local 703 as of September 1, 1990, and at all times thereafter, including the union-security and checkoff provisions of the agreements.

(c) Discouraging membership in or activities on behalf of Local 703 by refusing to bargain collectively with it as the duly designated collective-bargaining representative of employees employed in units for which those members and associated members had recognized Local 703 on September 1, 1990, by refusing to give full force and effect to any collective-bargaining agreements they had with the Union including recognition or joint recognition to another labor organization as the bargaining representative of employees in bargaining units represented by Local 703, by checking off from

¹ An evidentiary hearing took place on February 28, at which time the counsel for the General Counsel noted that she wished to add to the record certain formal papers—return receipts showing service of the two Orders to Show Cause, my order, dated January 21, 1994, setting the February 28 hearing date, and the responses of the various parties who appeared at that hearing showing cause why they should not be included under the order. Following the hearing, she filed a motion with me, March 11, 1994, asking that these documents be admitted into evidence as General Counsel's Exhs. (a) through (tt), the last exhibit being an index of the other exhibits. The motion is granted.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³ The employers named in the attached Exh. B have complied with the settlement agreement in the instant case and the employers listed in the attached Exh. C were dismissed by me, from the instant proceeding, at the hearing which was held on February 28, 1993. Thus the my Order in the instant case should not apply to any of the employers listed in Exh. B or Exh. C or to Market Services Association itself.

the pay of employees and not remitting to Local 703 money for union dues and fees, or otherwise discriminating against them in their hire or tenure.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain collectively in good faith with Local 703 as the exclusive collective-bargaining representative of all the employees employed by each named member or associate member in the respective bargaining unit in which they recognized Local 703 for collective-bargaining purposes on September 1, 1990.

(b) Give full force and effect to any collective-bargaining agreements they had respectively with Local 703 at all times during the period September 1, 1990, to the present including the union-security and checkoff provisions of the agreements.

(c) Withdraw and withhold recognition from any labor organization other than Local 703 as either the joint or exclusive bargaining representative of any employees in any bargaining unit represented by Local 703 as of September 1, 1990, unless and until the other labor organization becomes certified as the result of a Board-conducted election.

(d) Make whole all employees employed by each specified member and associate member in the bargaining unit for any loss of pay or benefits suffered by them by reason of the unfair labor practices found here.

(e) Jointly and severally with Truck Drivers Local 707 affiliated with the National Production Workers Union (Local 707 NPWU) make whole Local 703 for any union dues and fees which were checked off in the bargaining unit here from the pay of employees and remitted to any other party but Local 703, for those employees for whom it held checkoff authorizations in favor of Local 703 and jointly and severally with Truck Drivers Local 707 NPWU make whole any employees for any union dues and fees which were checked off in the respective bargaining unit and remitted to Respondent Truck Drivers Local 707 NPWU for those employees who had not executed checkoff authorizations in favor of Local 703 all of the payments to be made with interest.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at at their respective places of business in and about Chicago, Illinois, copies of the attached notice marked "Appendix A."⁴ Copies of the notice, on separate forms provided for each specified member as an associate member by the Regional Director for Region 13, after being signed by a representative of such members and associate members of the Respondents, shall be posted immediately upon receipt thereof and shall be maintained by the Respondents for 60 consecutive days in conspicuous places including all places where notices to employees are customarily placed. Reasonable steps shall be taken by each specified member and associate member of Respondents ensure that the notices are not altered, defaced, or covered by any other material.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the specified members and associate members of the Respondents have taken to comply.

IT IS FURTHER RECOMMENDED that with respect to Market Services Association and the employees listed in Exhibits B and C, the motion of the General Counsel, dated October 21, 1993, to set aside the settlement agreement, which was approved by me on December 30, 1991, was dismissed previously and that dismissal is confirmed and restated.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

[Employer named in Exhibit A] is posting this notice to comply with an order of the National Labor Relations Board which was issued after a hearing before an administrative law judge in a case in which we were found to have violated certain provisions of the National Labor Relations Act.

WE WILL NOT refuse to recognize and to bargain collectively with Local 703 International Brotherhood of Teamsters AFL-CIO as the exclusive collective-bargaining representative of all the employees employed in the bargaining unit in which we recognized Local 703 IBT as of September 1, 1990.

WE WILL NOT refuse to give full force and effect to any collective-bargaining agreement we had with Local 703 IBT as of September 1, 1990.

WE WILL NOT grant recognition to any labor organization other than Local 703 IBT as either the joint or exclusive collective-bargaining representative of any employees in any bargaining unit represented by Local 703 IBT as of September 1, 1990, unless and until the other labor organization becomes certified as the result of a Board-conducted election.

WE WILL NOT check off from the pay of any employees and remit to Truck Drivers Local 707 affiliated with the National Production Workers Union any money for union dues or fees.

WE WILL NOT discourage membership in or activities on behalf of Local 703 IBT by refusing to recognize and bargain collectively with it, by refusing to give full force and effect to any collective-bargaining agreement we have signed with the Union, including the union-security and checkoff provisions of the contracts, by granting recognition to another labor organization as the bargaining representative of employees in a bargaining unit lawfully represented by Local 703 IBT, by checking off from the pay of employees and remitting to another labor organization money for union dues and fees, or otherwise discriminating against employees in their hire or tenure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain collectively in good faith with Local 703 IBT as the exclusive collective-bargaining representative of all of the employees employed in the bargaining unit in which they were recognized for collective-bargaining purposes on September 1, 1990, and WE WILL

give full force and effect to any collective-bargaining agreement we had with Local 703 IBT as of September 1, 1990, including the union-security and checkoff provisions of the agreement.

WE WILL withdraw and withhold recognition from any labor organization other than Local 703 IBT as either the joint or exclusive bargaining representative of any employees in any bargaining unit represented by Local 703 IBT as of September 1, 1990, unless and until the other labor organization becomes certified as the result of a Board-conducted election.

WE WILL jointly and severally with Truck Drivers Local 707 NPWU, make whole Local 703 IBT for any union dues and fees which were checked off from the pay of our employees and remitted to Truck Drivers Local 707 NPWU for those employees from which we held checkoff authorizations in favor of Local 703 IBT, and jointly and severally with Truck Drivers Local 707 NPWU, WE WILL make whole any employees for any union dues and fees which we checked off and remitted to Truck Drivers Local 707 NPWU for those employees who had not executed checkoff authorizations in favor of Local 703 IBT, all of the payments to be made with interest.

[EMPLOYER NAMED IN EXHIBIT A]

EXHIBIT A

Alex Produce-Skokie	Garden Fresh
Arrigo & Sons	Produce
Ty Avros Produce	Tee Time Produce Ltd.
Balistreri Trucking	Treasure Island Foods
C & M Produce	Thomas J. Gatzolas
Carioto & Larsen, Inc.	Geronimo's Inc.
Jimenez Carniceria, Inc.	J & J Produce Co.
Carrot Top, Inc.	J & S Produce Co.
T. Castro Produce	John's Northwest Produce
Chicago Food Service Enterprises Inc.	J P Produce
Combined Foods Corp.	M. Klein Produce
Commonwealth Wholesale Produce, Inc.	La Mantia Bros. Arrigo Co.
Crystal Foods/Fabui, Inc.	Lanzarotta Bros. Co.
D & M Egg Co.	Lincoln Wholesale
S. Delisi & Sons	M & V Produce
Delmares Produce	Market Place
Diamond Produce	Charles McRae Wholesale Produce
Durante Bros. Produce	Midwest Produce, Inc.
El Rancho Produce	Mr. Tomatoes
Enriquez Produce	Naturally Fresh Provisions
Farmers Glory	Michael J. Navilio
Five Star Food Dist.	Pete's Produce
Falver Fresh Dist.	Quality Produce Supplier
Fresh Bunch, Inc.	Reliable Supermarkets
Fresh Market Service	Roins Produce
Fruteria Olivos	RWF Tomato Co.
	M. Signorelli Produce
	J. Spanola & Sons
	Sparta Produce
	Star Bear
	Steins/LTS Produce
	Tony's Produce
	Wainer Fruit Co.

EXHIBIT B

The employers named in Exhibit B below have complied with the instant settlement agreement:

Anton Argires Bros. & Co.	Atom Banana, Inc.
Auster Company	Battaglia Distributing
Berkowitz Co.	Big Apple Finer Foods, Inc.
California Sprout & Celery	Capitol Wholesale Produce
J. Caruso Produce	Cee Bee Cartage
Chicago Melon Corp.	City Wide Produce
George J. Cornille & Sons, Inc.	Joseph Cosentino Co.
Coyne Produce	D'Amico Produce
Dietz & Kolendenko Co.	Durante & Termini
Evergreen International Produce	Harry A. Fandre
Finer Foods, Inc.	Market Service
G. W. Produce	Ira I. Fisher, Inc.
Gentile Bros. Produce	General Produce Dist.
Harris Motor Express	Get Fresh Produce
DJ Karos Company (Kros Produce Company)	Hoversen & Sons
Orval Kent Food Company	Jack Keller Co.
La Preferida, Inc.	Tom Kutsulis Co.
Loutos Cartage Service	La Hacienda Brands
Mandolini Co.	Lurie Bros.
Market Cartage	Anthony Marano Co.
Midwest Foods	Austin J. Merkel Co.
Morris Nathan Produce	Mushroom Growers Sales Assn.
Olympic Wholesale Produce	Northwest Express
Panama Banana Dist. Co.	Original Chicago Produce
Pets Calvert Co.	Pedi Bros. Wholesale Produce
Leo Pusateri & Sons	S. J. Piraino Co.
R & S Produce	Quality Celery & Sprout Co.
C. Ruffolo & Sons	Al Rinella Wholesale Produce
Sansone Motor Freight	S & M Produce, Inc.
Bernard Smith Produce	Sisiliano Motor Freight
Son-Quang Corp.	Irv Solomon & Son
Strube Celery & Vegetable Co.	South Water Produce
Tri Workers, Inc.	Dominick Testa & Son, Inc.
Jack Tuchten Wholesale Produce	Tropical Wholesale Produce
	United Potato Co.
	Victory Spud Service
	Market Services Association
	Universal Fruit Co.
	Thomas S. Zaccone, Wholesale Produce

EXHIBIT C

The employers named in Exhibit C were dismissed by me at the hearing held on February 28, 1993.

ABC Food Remem-
berances
Daniels Wholesale
Produce
Green Garden
Produce
Kramer Produce

Berwyn Fruit Mar-
ket, Inc.
Gino & Sam's Whole-
sale Produce
Kenosha Fruit Mar-
ket
La Bodega, Inc.

Marines Bros.
Mike's Taters
Nice N'Easy Foods
Parsnips Persimmons
& Katz
Rizes Produce,
Inc.
A. Stallone, Inc.
Vegetable Fresh,
Inc.
Watermelon Depot

Meadow Brook Pro-
duce Co. (Meadow-
brook Egg)
Nat's Garden
Produce
North Water Market
N. S. Pizzo & Sons,
Inc.
Russo's Produce
Valley Fruit &
Produce